Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1975
No. 75-525

ANTHONY D. PIRILLO, JR., ESQUIRE, et al.,
Appellants

v.

HONORABLE HARRY A. TAKIFF, et al.,
Appellees

MOTION TO DISMISS OR AFFIRM

On Appeal From the Supreme Court of Pennsylvania

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees The Honorable Harry A. Takiff, *et al.*, move to dismiss or affirm this appeal on the following grounds:

(1) The appeal is not within the jurisdiction of this Court because it is not taken from a final judgment or decree, as required by 28 U.S.C. §1257;

(2) The federal question sought to be reviewed was not timely or properly raised, or expressly passed upon;

(3) The appeal does not present a substantial federal question.

In the alternative, appellees request this Court to deny appellants' petition for a writ of certiorari under 28 U.S.C. §1257 (3) on the grounds set forth above.

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COUNTER-STATEMENT OF THE CASE

On March 11, 1974, the Pennsylvania Crime Commission issued its Report on Police Corruption and the Quality of Law Enforcement in Philadelphia (hereinafter referred to as the Crime Commission Report) in which it charged that there was ongoing, systematic and widespread corruption at all levels of the Philadelphia Police Department. In response to this report, the Pennsylvania Attorney General on March 26, 1974, established the Office of the Special Prosecutor by appointing appellee Walter M. Phillips, Jr., as Deputy Attorney General to investigate and prosecute police corruption in Philadelphia.

On January 31, 1974, appellee the Honorable Harry A. Takiff, Judge of the Court of Common Pleas of Philadelphia County, charged the January 1974 Grand Jury to specially investigate, *inter alia*, corruption in the Philadelphia Police Department.

Among the witnesses subpoenaed to testify before the January 1974 Special Investigating Grand Jury were twelve Philadelphia officers [1] who had been mentioned in the Crime Commission Report as recipients of bribes from various Philadelphia businesses. Each was represented by appellant Anthony D. Pirillo, Jr., Esquire, or his associate, Salvatore J. Cucinotta, Esquire, who are retained on a per-hour basis by the Fraternal Order of Police, an organization of present and former policemen, to represent its members in a variety of proceedings, including grand jury appearances. Prior to the swearing of these witnesses, Judge Takiff was advised by Assistant Attorneys General assigned to the Office of the Special Prosecutor in an *in camera* proceeding that the witnesses would be questioned concerning alleged criminal activity of themselves and each other, on the basis of detailed information contained in the Crime Commission Report.

[1] The officers are Michael Petta, Alfred C. Pfeiffer, William Deabler, Edward Milewski, Ronald Kluge, John Beal, Carmen Giordano, Harry Quigley, Leroy Ward, James Malaby, Joseph Corvi and George Ewell.

On the basis of apparent conflicts of interest arising out of both appellant Pirillo's fee arrangement with the Fraternal Order of Police and the multiple representation of witnesses who were being called to give testimony concerning possible criminal activity of each other, the Office of the Special Prosecutor petitioned Judge Takiff to disqualify appellant Pirillo from representing the twelve police officers in their scheduled appearances before the January 1974 Special Investigating Grand Jury. After holding a hearing at which appellants were allowed to present testimony regarding the possibility of waiver of conflict-free counsel, Judge Takiff, on August 14, 1974, entered an order and opinion granting the petition for disqualification. In his opinion, Judge Takiff found that both the fee arrangement and the multiple representation created conflicts of interest of such a magnitude to warrant disqualification, and, further, that such conflicts of interest were not and could not be effectively waived.

On October 4, 1974, appellant Pirillo and the twelve subpoenaed policemen filed a petition for a writ of pro-

hibition in the Supreme Court of Pennsylvania against the Honorable Harry A. Takiff and special prosecutor Walter M. Phillips, Jr. Briefs were filed and oral argument heard. On July 7, 1975, the Supreme Court of Pennsylvania affirmed the decision of Supervising Judge Takiff, *Pirillo v. Takiff*, —— Pa. ——, 341 A.2d 896 (1975).

A petition for reargument was filed in the Supreme Court of Pennsylvania by appellant Pirillo on October 3, 1975. Briefs were filed and oral argument heard. No decision has been rendered as yet on this petition.[2]

On December 15, 1975, the January 1974 Special Investigating Grand Jury was discharged. A new grand jury was empanelled on November 26, 1975, to continue the work and investigation of the January 1974 Grand Jury. The twelve Philadelphia policemen involved in *Pirillo v. Takiff* have been subpoenaed to testify before the November 1975 Grand Jury.

[2] Much of appellants' statement of the case refers to Philadelphia police officers not party of the original litigation. These other officers were subpoenaed to testify before the January 1974 Special Investigating Grand Jury after July 7, 1975. The status of these police officers is not relevant to consideration of *Pirillo v. Takiff, supra.*

ARGUMENT

I. This Appeal Is Not Within the Jurisdiction of This Court Because It Is Not Taken From a Final Judgment or Decree, as Required by 28 U.S.C. §1257

Appellants seek to invoke the jurisdiction of this Court by way of appeal or, in the alternative, by petition for a writ of certiorari, pursuant to Title 28, United States Code, sections 1257(2) and 1257(3). In either case, it is manifest that this Court does not have jurisdiction since the decision in the court below is not a final judgment or decree. After the Supreme Court of Pennsylvania issued its decision and opinion denying appellants' petition for a writ of prohibition, appellants filed a petition for reargument *nunc pro tunc* with that court. Briefs were submitted and oral argument heard on appellants' petition for reargument; however, as of this date, no decision has been rendered. This Court has held that once rehearing is granted,

> "the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing."
>
> *Market St. Ry. Co. v. Railroad Commission*, 324 U.S. 548, 552 (1945).

Clearly, until a decision is rendered by the Pennsylvania Supreme Court on appellants' petition for reargument,

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the judgment from which appellants seek to obtain review is not yet final and thus is not properly within the jurisdiction of this Court at this time.

II. The Primary Federal Question Sought To Be Reviewed Was Not Timely or Properly Raised, or Expressly Passed Upon

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Appellants' claim of jurisdiction for a direct appeal from the decision of the court below rests upon their assertion that the validity of a state statute, *i.e.*, the American Bar Association Code of Professional Responsibility (hereinafter the "ABA Code"), has been drawn into question on the ground of its being repugnant to the Constitution of the United States. While the ABA Code has been adopted as the standard of conduct for attorneys in Pennsylvania, *see* Pa. R.C.P. 205, the decision of the court below did not rest on Code provisions (which are directly applicable only in a disciplinary proceeding), but rather on the inherent power of the court to disqualify an attorney in a grand jury proceeding when warranted by a finding of a manifest conflict of interest. *See, Pirillo v. Takiff*, —— Pa. ——, 341 A.2d 896 (1975). In addition, the issue sought to be raised by appellants in this appeal, *i.e.*, the constitutionality of the ABA Code, was neither timely nor properly raised nor expressly passed upon by the state court. *Pirillo v. Takiff, supra.* Therefore, to the extent that appellants rely on the unconstitutionality of the ABA Code, as adopted by the Pennsylvania courts, appellants have failed to establish a sufficient basis for a direct appeal to this Court. 28 U.S.C. §1257-(2). Moreover, since that issue was not properly raised

or expressly passed upon by the state court, it should not be considered as a basis for appellants' petition for certiorari. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

III. The Appeal Does Not Present a Substantial Federal Question

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In attempting to establish that this appeal raises a substantial federal question, appellants assert the following: (1) that the extension of the decision in *Pirillo* to policemen not parties to the original action violates the constitutional rights of those policemen; (2) that the decision in *Pirillo* is in conflict with recent decisions of this Court and lower federal courts; and (3) that the decision in *Pirillo* unconstitutionally abridges the right of an association to organize to obtain effective legal representation. On the contrary, examination of these assertions in light of the applicable Pennsylvania and federal law establishes that this appeal raises no substantial federal questions.

A. The extension of Pirillo to policemen not parties to the original action is irrelevant in reviewing that decision.

As conceded by appellants, the decision in *Pirillo* was expressly limited in its application to the twelve policemen who were party to that action. However, appellants argue that the initiation by the Office of the Special Prosecutor of separate proceedings to have appellant Pirillo disqualified from representing other policemen not parties to the original action violates the constitutional

rights of those policemen and further provides a substantial basis for the review of the decesion in *Pirillo* by this Court. By attacking the legality of proceedings entirely separate and distinct from the proceedings which were the subject of the *Pirillo* decision, appellants ask this Court to pass upon issues clearly outside the scope of *Pirillo v. Takiff*. Such an advisory opinion is not permissible, *United States v. Fruehauf*, 365 U.S. 146, 157 (1961), *reh. denied* 365 U.S. 875 (1961), particularly in view of the fact that the issue of the extension of *Pirillo* to additional police witnesses is presently before the Supreme Court of Pennsylvania.[3]

B. The decision in Pirillo is not in conflict with recent decisions of this Court or other federal courts.

Appellants' assertion that the recent decisions in *Faretta v. California*, 17 Crim. L. Rep. 3155 (U.S. June 30, 1975), and *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975),[4] raise serious questions concerning the constitutionality of the result reached in *Pirillo* is incorrect.

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[3] *Salvatore J. Cucinotta, Esquire, v. The Honorable Matthew W. Bullock, Jr.*, No. 479, Miscellaneous Docket No. 20, reargument heard in the Pennsylvania Supreme Court on October 23, 1975. No decision has been promulgated as of the date of this brief.

[4] Petitioner also relies on *United States v. Jeffers*, 17 Crim. L. Rep. 2421 (7th Cir. July 30, 1975). We believe that this reliance is misplaced as *Jeffers* turned on the attorney's erroneous application of ethical standards and not on the defendant's intelligent relinquishment of a known right. In *Jeffers*, trial counsel believed that ethical considerations precluded him from conducting a thorough cross-examination of a government witness because counsel's partner had previously represented the witness in a homicide prosecution and, as a result, counsel was in possession of privileged information. The court emphasized that there was no conflict between the witness and the defendant because no current relationship existed between the witness and counsel. The court indicated that such an on-going relationship could have mandated a different result. The court held that failure to fully cross-examine arguably amounted to ineffective assistance of counsel but that a new trial was not required because counsel, on behalf of this client, had waived the right to a more extensive cross-examination. The *Jeffers* case is unlike the instant case because the defendant in *Jeffers* did not voluntarily waive any of his rights. The waiver was the result of an error of trial counsel. This error was recognised by the court but was held not to be of such a magnitude as to require reversal.

In *Faretta, supra,* this Court held that a defendant had the right to knowingly and intelligently waive the assistance of counsel at trial; in *Garcia, supra,* the Fifth Circuit held that a defendant may knowingly and intelligently waive his right to conflict-free counsel at trial. These decisions, while clearly delineating the rights of a criminal defendant at trial, have no application to a grand jury proceeding where, as this Court has held, a witness is not entitled to the full panoply of rights afforded a defendant at trial. *United States v. Calandra,* 414 U.S. 338 (1974).

The state has an overriding interest in assuring that the grand jury conducts its investigation in an atmosphere unhampered by conflicts of interest caused by representation of both prospective governmental witnesses and defendants by the same counsel. *Pirillo v. Takiff, supra,* at , 341 A.2d at 902-06; *In re: Investigation Before the April, 1975 Grand Jury,* 18 Cr. L. Rep. 2183 (D.D.C. November 13, 1975) as the Pennsylvania Supreme Court stated:

"A grand jury proceeding is not an adversary hearing in which the guilt or innocence of an accused is determined. Consequently, certain constitutional and supervisory protections have been held inapplicable to the grand jury proceeding in order to facilitate the jury's quest to determine whether a crime has been committed and whether a prima facie case exists which warrants the institution of criminal proceedings. . . ."

Pirillo v. Takiff, Pa. at , 341 A.2d at 902 (collecting cases). *See also, United States v. Calandra, supra,* at 343.

The grand jury exists to serve the public. Its job is to "search for the truth in areas of alleged criminality affecting the peace and security of all persons in the Commonwealth". *Pirillo v. Takiff, supra,* at , 341 A.2d at 902. Because of the great public interest in the grand jury's search for the facts and its right to compel "every man's evidence", *United States v. Nixon,* 418 U.S. 683, 709 (1974), the Supreme Court of Pennsylvania and others have held that the full panoply of constitutional rights due a criminal defendant are not applicable to a grand jury witness. *Commonwealth v. McCloskey,* 443 Pa. 117, 277 A.2d 764 (1971).

The decision to grant or withhold any rights is the product of a balancing of state and individual interests. Where the state's interest is compelling, and is expressed in terms least restrictive of individual rights, it will prevail. *NAACP v. Button,* 371 U.S. 415 (1963). Where the individual interest is superior, as in the case of a defendant at a criminal trial whose very liberty is at stake,

considerable rights will be granted. Consequently, while the fourth amendment exclusionary rule is mandatory at trial, *Mapp v. Ohio,* 367 U.S. 643 (1961), it does not apply to grand jury proceedings because its application would too severely hamper the grand jury's search for the facts. *United States v. Calandra, supra.* Also, while the right to counsel in a criminal trial is required by the Sixth and Fourteenth Amendments to the Federal Constitution, *Gideon v. Wainwright,* 372 U.S. 335 (1963), the right to counsel at a grand jury proceeding may be restricted after balancing competing rights. *Commonwealth v. McCloskey, supra.* (In Pennsylvania, counsel may not accompany a witness into the grand jury room.)

Even though the right to counsel at a criminal trial is absolute, the Sixth Amendment right to counsel does not encompass the right to be represented by a particular counsel. For example, while an indigent defendant has the right to court-appointed counsel, he does not have the right to demand the services of a particular attorney to represent him. In addition, the right to choice of counsel can be restricted where there is a compelling state interest in the selection of alternative counsel. In *Moore v. Jamieson,* 451 Pa. 299, 306 A.2d 283 (1973), the state interest in the expeditious trial of cases was determined to be paramount over the right of an individual defendant to his first choice of counsel. The Supreme Court of Pennsylvania there stated:

"'Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice. . . .'"

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Moore v. Jamieson, supra, at 309, 306 A. 2d at 289 citing *United States ex rel. Carey v. Rundle,* 409 F.2d 1210, 1214-1215 (3d Cir. 1969), *cert. denied* 397 U.S. 946 (1970).

Moore is analogous to the instant case. In *Moore,*[5] the state's interest in speedy trial and the right of the court to control its own docket prevailed, on balance, over the individual's right to counsel of his own choice. In *Pirillo,* the state's interest in the grand jury's fact-finding process was found to override the individual's right to counsel of his choice. Neither *Faretta* nor *Garcia* change this result because there the state's interest was minimal as compared to that of the defendant.[6]

In addition, a waiver of these conflicts by the grand jury witness is not possible for two reasons. First, unlike *Faretta* and *Garcia* where all of the facts relevant to a possible conflict were known, the present situation is one of potentialities only, *Pirillo v. Takiff, supra,* at , 341

[5] *Moore v. Jamieson* was reversed on grounds not relevant to the issue of choice of counsel.

[6] The Court in *Faretta* emphasized the personal nature of the decision-making process at trial:

> "The right to defend is *personal.* The defendant, and not his lawyer or the state, will bear the *personal* consequences of a conviction. It is the defendant, therefore, who must be free, *personally* to decide whether in his particular case counsel is to his advantage."
>
> *Faretta, supra,* at , 45 L. Ed. 2d at 581. (Emphasis supplied.)

Therefore the benefits and consequences of learned representation will flow only to the defendant and a knowing and intelligent relinquishment of that right, *Johnson v. Zerbst,* 304 U.S. 458, 465 (1938), will not injure the state.

A. 2d at 902-03. A valid waiver pursuant to *Johnson v. Zerbst, supra,* n.6, is not possible in a situation of such uncertainty. Second, even assuming, *arguendo,* that a defendant could waive his rights to conflict-free counsel before a grand jury, he could not waive the rights of the grand jury which such a waiver would violate. These include the rights to grand jury secrecy and to the unfettered access to information. *Pirillo v. Takiff, supra,* at , n.5, 341 A. 2d at 905, n.5. Had the interest of the grand jury been a factor in *Faretta* or *Garcia,* the balance would have been altered and the result different.[7] For these reasons, we believe appellants' second argument to be without merit.

C. The decision in Pirillo does not unconstitutionally abridge the right of an association to organize to obtain effective legal representation.

Appellants argue that the decision in *Pirillo v. Takiff* unconstitutionally abridges the right of an association, the Fraternal Order of Police (hereinafter F.O.P.), to organize to obtain meaningful legal representation. This contention is erroneous because the narrow holding of *Pirillo* represents the least restrictive alternative in balancing the first amendment right to collective activity against legitimate state interests.

The F.O.P. is an organization comprised of present and former policemen. One of the services the F.O.P.

[7] In note 4 to *Garcia,* the court stated that:

> "there is no clear indication that a knowing and intelligent waiver of the right to effective counsel in these circumstances would adversely affect the defendants', the prosecutor's or the public's interest in a fair trial."

provides its members is free representation by counsel (who is paid on a per-hour basis by the F.O.P.) when they are charged with a crime or subpoenaed to testify before a grand jury. *Pirillo v. Takiff, supra,* Pa. at , 341 A. 2d at 901. Unquestionably, the right of the F.O.P. and its members to so organize to obtain effective legal representation is a right protected by the First Amendment. *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Rrd. Trainmen v. Virginia,* 377 U.S. 1 (1964); *NAACP v. Button,* 371 U.S. 415 (1963); *Pirillo v. Takiff,* Pa. , 341 A. 2d 896 (1975). However, that right is not absolute but must be balanced against competing state and public interests. When the state interest, on balance, is overriding, and is expressed in terms least restrictive of individual rights, the competing right must fail. *Brotherhood of Rrd. Trainmen v. Virginia, supra,* at 8; *NAACP v. Button, supra,* at 444; *In re: Investigation Before the April, 1975, Grand Jury, supra,* at 2183; *United States ex rel. Carey v. Rundle, supra,* at 1214.

In *NAACP v. Button, supra,* this Court struck down a Virginia statute which, as interpreted by that state's highest court, prohibited any arrangement by which prospective litigants were advised to seek the assistance of particular attorneys. 371 U.S. at 433. In *Trainmen, supra, United Transportation, supra,* and *United Mine Workers, supra,* this Court reversed the granting of injunctions designed to prevent the unions from referring injured members to particular attorneys in Federal Employers Liability Act litigation. In *United Mine Workers,* the lawyers were paid a salary by the union. In each of these cases, this

Court recognized that the state had a legitimate interest in preventing unethical legal activities, such as "solicitation" or the unauthorized practice of law, but held that the record below failed to demonstrate that any danger actually existed, or that the particular remedy sought to be enforced was not sufficiently tailored to meet only situations involving real and substantial danger to either the individuals or the public, and was thus impermissibly overbroad.

In *Pirillo,* the Supreme Court of Pennsylvania recognized the legitimate interest of the state in furthering the investigation of a grand jury charged "to discover past and continuous criminal acts which seriously affect or injure the public". Pa. at , 341 A. 2d at 902. Moreover, the court found that, in disqualifying the attorney-appellant, the supervising judge sought "to protect the public function of the grand jury, *i.e.*, to insure that the grand jury's search for truth in areas of alleged criminality affecting the peace and security of all persons and the Commonwealth would not be unduly impaired". Pa. at , 341 A.2d at 902. Specifically, the court affirmed the finding of the supervising judge that the hostility of the F.O.P. towards an anti-corruption investigation, which was shared by the attorney-appellant retained by the F.O.P. to represent its members, rendered their fee arrangement improper because of the manifest harm to both the witnesses and to the efforts of the grand jury, Pa. at , 341 A. 2d at 904.[8]

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[8] ". . . Throughout the investigations into police corruption conducted by the Pennsylvania Crime Commission and the June, 1972, Special Investigating Grand Jury, the F.O.P. has consistently taken the position that these investigations were a threat to its members and made numerous efforts to

Argument

Recognizing both the First Amendment right of appellants to organize to obtain effective legal representation and the legitimate interest of the public in ensuring that

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thwart these investigations. For example, when the Crime Commission subpoenaed Police Commissioner Joseph O'Neill to testify, the F.O.P. sought to intervene and quash that subpoena on the ground that the investigation would violate the rights of police officers. *See Pennsylvania Crime Commission Subpoena*, 453 Pa. 513, 309 A.2d 401 (1973). When the Crime Commission was about to issue its report, the F.O.P. sued to enjoin publication. *Fraternal Order of Police v. Packel*, 295 Commonwealth Court Docket (1974) (dismissed with prejudice on defendant's request, Jan. 6, 1975). In addition, the F.O.P. sought to quash subpoenas issued by the June, 1972, Grand Jury. In each of these matters, the F.O.P. was represented by petitioner Pirillo. The F.O.P.'s attitude of broad noncooperation is apparently shared by respondent Pirillo, the attorney paid by the F.O.P. to represent its individual members. Thus, petitioner Pirillo testified that whenever a police officer indicated that he might consider cooperating, he would immediately remove himself as counsel and advise the witness to hire another attorney. This fee arrangement clearly has a chilling effect upon a police witness who is considering cooperation, since his access to F.O.P. paid counsel depends directly on his agreement not to cooperate. Moreover, the limited viability of the options open to a police witness suspected of illegal activity is further demonstrated by petitioner Pirillo's testimony that he would discuss the possibility of a witness cooperating only when the witness has come to him and raised the possibility. The failure of petitioner Pirillo to raise the subject of cooperation, apparently as a result of his fee arrangement with the F.O.P., deprives the witnesses of their right to the full and complete loyalty of their attorney."

—— Pa. at ——, 341 A. 2d at 930-04. (Footnotes omitted.)

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Argument

the grand jury investigation would not be unduly impaired, the court in *Pirillo* then employed a four-part balancing test:

> "'(1) Whether the state interest(s) sought to be achieved can be effectively accomplished in some manner which will not infringe upon interests protected by constitutional rights; (2) Whether the state interest(s) (are) sufficiently compelling when compared with the interests affected, (to justify) any infringement of those interests; (3) Whether the state interest(s) (are) sufficiently compelling to justify the degree of infringement that is necessary to effectuate that interest; (4) Whether the provision under challenge represents the narrowest possible infringement consistent with effectuating the state interest involved.'" Pa. at , 341 A. 2d at 905.

Noting that "the interests of the state are sufficiently compelling to justify appropriately tailored infringements of constitutional rights" and that the appellants had failed to suggest any "alternative means by which the interests of the state may be protected", the court held that the infringement resulting from the order of the supervising judge was constitutionally permissible. Pa. at , 341 A. 2d at 905-906.

Thus unlike *Button* and *United Mine Workers*, the state court in *Pirillo* found that the fee arrangement between appellant and the F.O.P. established a real and not merely a potential or theoretical public harm warranting some degree of infringement of individual rights. Moreover, unlike *United Transportation Union, supra*, the court in *Pirillo* found that the remedy was appropriately tailored

to meet only the actual danger and was thus the least restrictive alternative available:

> ". . . The order . . . [of the Grand Jury Supervising Judge] pertains only to the conduct of the grand jury investigation. Recourse to F.O.P. lawyers in other legal matters is not restricted. There is no deterrence or chilling effect on the political expression of the F.O.P. and no smothering of discussion of common interests to its members or disruption of F.O.P. efforts to initiate and defend legal matters or to provide legal service to its members save in this single proceeding." Pa. at , 341 A. 2d at 906.

It should be noted that the reasoning of *Pirillo* has been followed by the United States District Court for the District of Columbia, *In re: Investigation Before the April, 1975, Grand Jury, supra,*[9] which recently granted a peti-

[9] In *In re: Investigation Before the April, 1975, Grand Jury, supra,* one attorney, Sol L. Rosen, Esquire, represented twenty-one members of a union who were subpoenaed to testify before a grand jury. The District Court held that "Mr. Rosen's multiple representation of the pressmen has caused a stifling of the grand jury investigation. The witnesses, based upon insubstantial advice from counsel, have refused to cooperate; the prosecutors, because of the pressmen's blanket, unadvised claims of the privilege against self-incrimination cannot intelligently determine which pressman should be granted immunity in order to further the investigation." 18 Cr. L. Rptr. at 2183. That court held that while this order would necessarily restrict each pressman's right to choose a particular attorney, this impairment would not be constitutionally infirmed because it was only for this single grand jury proceeding that the pressman would be unable to join to retain a particular counsel.

tion to disqualify a single attorney retained by the pressmen's union to represent all of its members before a grand jury investigating disturbances during a strike. There the court concluded:

> "In sum, requiring the pressmen to obtain separate counsel—if they wish to retain counsel at all—constitutes a minimal and temporary impairment of their constitutional rights under the first amendment. Moreover, such an order would permit the grand jury, now at a standstill, to proceed with its investigation with full force and with no fear of compromising the secrecy of its proceedings."
> Slip opinion at 10.

While the first amendment rights of the F.O.P. are potentially affected by the decision in *Pirillo,* they, in fact, are not constitutionally affected as the decision represents the least restrictive alternative possible in order to enable the grand jury to carry out its legitimate public functions.

CONCLUSION

For the reasons set forth above, appellees respectfully request this Court to dismiss or affirm this appeal or, in the alternative, to deny appellants' petition for a writ of certiorari.

Respectfully submitted,

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